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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/573,784

03/28/2006

Luz Sanguansri

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5502

22428 7590 11/23/2009  
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EXAMINER

WARE, DEBORAH K

ART UNIT

PAPER NUMBER

1651

MAIL DATE

DELIVERY MODE

11/23/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b><i>Advisory Action Before the Filing of an Appeal Brief</i></b>	<b>Application No.</b> 10/573,784	<b>Applicant(s)</b> SANGUANSRI ET AL.	
	<b>Examiner</b> DEBBIE K. WARE	<b>Art Unit</b> 1651	

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 19 October 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
 (b) ☐ They raise the issue of new matter (see NOTE below);  
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
 5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
 6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
 The status of the claim(s) is (or will be) as follows:  
 Claim(s) allowed: None.  
 Claim(s) objected to: None.  
 Claim(s) rejected: 1-11.  
 Claim(s) withdrawn from consideration: 12-15.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
The argument that none of the steps for providing the combination of protein and a carbohydrate is noted, however, the reference clearly teaches mixing a water dispersible probiotic microbe in an aqueous suspension of a protein and a carbohydrate. Note col. 13, lines 1-8 and line 51 and line 55, wherein each of casein and pectin are disclosed to be used as components of the encapsulant because combined together they control release properties of the active ingredient which is a Lactobacilli microorganism. Furthermore, other ingredients such as fat and/or oil can be added to encapsulate a probiotic. Also starch is disclosed, note col. 13, line 45. Further, pectin can equally function as a prebiotic. Also the claims are not determined patentable by the process of how the product is made unless there is a distinct difference between the product made and the disclosed product. The reference clearly teaches an encapsulated probiotic which is what the claims are drawn to as well. There is no difference between the product by process claims and the disclosed product. An emulsion is contemplated by the teachings of the reference because the ingredients of oils, fats and emulsifiers are disclosed to be capable of being mixed together (note col. 13, lines 24-25). Applicants' Representative urge that the reference does not disclose whey protein for the intended use as an encapsulant, however, the reference clearly teach that whey protein can be used to facilitate processing as an alternative to improvement of sensory attributes. Also the claims are not so limited to a film forming substance since the process steps of (b) and/or c) do not necessarily need to be carried out. Also the reference does teach pectin as an additional component of the encapsulant mixture and the presence of this carbohydrate in combination with a protein in mixture will inherently provide for a film forming protein if such teaching is determined to be lacking in the cited reference.

12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_

13. ☐ Other: \_\_\_\_\_

/DKW/  
Deborah K. Ware  
Examiner  
Art Unit: 1651

/David M. Naff/  
Primary Examiner, Art Unit 1657

U.S. Patent and Trademark Office  
PTOL-303 (Rev. 08-06)

**Advisory Action Before the Filing of an Appeal Brief**

Part of Paper No. 20091119